EXHIBIT 22

Olson v. E.F. Hutton & Co., Inc.
C.A.8 (Minn.),1992.

United States Court of Appeals,Eighth Circuit.
Darwin A. OLSON; Michael J. Fogarty; Lyle R. Pappenfuss; C.O. Brown Agency, Inc., Administrator; C.O. Brown Agency, Inc., Profit Sharing Trust; C.O. Brown Agency, Inc., Pension Trust, Appellants,
v.
E.F. HUTTON & COMPANY, INC.; Shearson Lehman Hutton, Inc.; Kenneth H. Bayliss, Jr.; Appellees.
No. 91-1416.

Submitted Oct. 17, 1991.
Decided Feb. 27, 1992.

Trustees of pension plan brought action against account broker alleging breach of fiduciary duty under ERISA, violations of Securities Exchange Act, and violations of Minnesota Securities Act. The United States District for the District of Minnesota, Diana E. Murphy, J., granted summary judgment for broker, and trustees appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that: (1) there were triable issues of fact as to whether account broker exercised discretionary control over pension plan, and (2) securities laws could be invoked to bridge any gap in federal protection if broker's actions caused damage not insured by banking laws.

Vacated and remanded.

West Headnotes

[1] Labor and Employment 231H 461

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk460 Who Are Fiduciaries
231Hk461 k. In General. Most Cited Cases
(Formerly 296k44)
Under ERISA, person is "fiduciary" if he exercises discretionary authority, regardless of whether that authority was ever granted or if he has actually been granted discretionary authority, regardless of whether that authority is ever exercised. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[2] Labor and Employment 231H 461

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk460 Who Are Fiduciaries
231Hk461 k. In General. Most Cited Cases
(Formerly 296k44)
For purposes of determining whether party is "fiduciary" within meaning of ERISA, determination of whether there existed mutual agreement or understanding between parties that advice would be primary basis for plan's investment decisions is comparable to "meeting of the minds" component of contract cases. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[3] Labor and Employment 231H 467

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk460 Who Are Fiduciaries
231Hk467 k. Advisors, Consultants, and Brokers. Most Cited Cases
(Formerly 296k43.1, 296k43)
Fiduciary status may be imposed on broker if facts show that broker understood his advice would be primary basis for plan's investment decisions with respect to plan assets. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[4] Federal Civil Procedure 170A 2497.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases

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170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In General. Most Cited Cases
(Formerly 170Ak2497)
There were genuine issues of material fact, precluding summary judgment for account broker, on question of whether broker was fiduciary liable for investment decisions for plan under ERISA in light of evidence that broker did not obtain permission to trade certificates of deposits although he did obtain permission to trade stocks. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[5] Federal Civil Procedure 170A 2497.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In General. Most Cited Cases
(Formerly 170Ak2497)
In light of evidence that account broker and trustees of pension plan had understanding that broker's investment advice would serve as primary basis for investment decisions, there were genuine issues of material fact, precluding summary judgment for broker, on whether broker was fiduciary within meaning of ERISA. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[6] Securities Regulation 349B 5.16

349B Securities Regulation
349BI Federal Regulation
349BI(A) In General
349Bk5 Securities, What Are
349Bk5.16 k. Certificates of Deposit. Most Cited Cases
Certificates of deposit may qualify as securities. Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.

[7] Securities Regulation 349B 5.10

349B Securities Regulation
349BI Federal Regulation
349BI(A) In General
349Bk5 Securities, What Are
349Bk5.10 k. In General; Investment Contracts. Most Cited Cases
For purposes of determining whether investment is under protection of securities laws, if existing regulations guarantee return of investment, securities laws provide no added protection; if investment is not guaranteed, securities laws may be applied to what would otherwise qualify as security. Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.

[8] Securities Regulation 349B 60.32(3)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.17 Manipulative, Deceptive or Fraudulent Conduct
349Bk60.32 Conduct of Broker-Dealers
349Bk60.32(3) k. Unauthorized or Excessive Trading; Churning. Most Cited Cases
"Churning" occurs when securities broker buys and sells securities for customer's account, without regard to customer's investment interest, for purpose of generating commissions. Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.

[9] Securities Regulation 349B 60.19

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.17 Manipulative, Deceptive or Fraudulent Conduct
349Bk60.19 k. Particular Conduct. Most Cited Cases
Claims by trustees of pension plan that account broker engaged in trading of certificates of deposit (CDs) prior to maturity were covered by securities laws; by buying and selling CDs in order to obtain gains due to changing interest rates, trustees relied on broker's expertise and banking laws did not protect against lost value under those circumstances. Securities Exchange Act of 1934, § 1 et seq., 15

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U.S.C.A. § 78a et seq.

[10] Securities Regulation 349B 2.30

349B Securities Regulation
349BI Federal Regulation
349BI(A) In General
349Bk2 Constitutional and Statutory Provisions
349Bk2.30 k. Construction and Operation in General. Most Cited Cases
If account broker's actions allegedly taken on behalf of trustees of ERISA pension plan caused damage not insured by banking laws, securities law may be invoked to bridge gap in federal protection. Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.

***624** Gary Hansen, St. Paul, Minn., argued (Peter E. Hintz, on the brief), for appellants.
Perry M. Wilson, III, Minneapolis, Minn., argued (J. Jackson, on the brief), for appellees.

Before LAY,[FN*] Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

FN* The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

FLOYD R. GIBSON, Senior Circuit Judge.

The district court granted summary judgment in favor of E.F. Hutton, Shearson Lehman Hutton, and Kenneth Bayliss (hereinafter referred to collectively as "the appellees"), ruling that the defendants were not fiduciaries with respect to two ERISA plans and that the certificates of deposit sold by the defendants were not securities. We vacate the judgment of the court and remand for further proceedings.

I. BACKGROUND

C.O. Brown, Inc. is an insurance agency which administrates two employee benefit plans for its employees.[FN1] In 1983, plaintiffs Olson, Fogarty, and Pappenfuss became the trustees of both plans. The trustees, believing they lacked the requisite expertise, experience, and knowledge to make sound investment decisions, met with Bayliss, an account broker with E.F. Hutton.[FN2] The trustees informed Bayliss they hoped to maintain 80% of the funds invested in bonds or "bond instruments" and 20% invested in stock, and to receive a return of approximately 8 1/2 %. Bayliss indicated these goals were reasonable and, upon Bayliss' suggestion, the trustees agreed to invest in certificates of deposit ("CDs") instead of bonds. As a result of these meetings, Bayliss became the account representative for the profit sharing trust; in 1985, he became the representative for the pension trust. Bayliss was not given discretionary authority over the accounts and was supposed to obtain approval from a trustee prior to buying or selling on the trusts' behalf.

FN1. A pension trust was formed in 1953 and a profit sharing trust was formed in 1969.

FN2. E.F. Hutton was later acquired by Shearson Lehman Hutton, Inc. ("Shearson"). Bayliss continued as a broker with Shearson after this acquisition.

The trustees received monthly and annual statements from E.F. Hutton, but they could not understand them. Bayliss told the trustees he would prepare quarterly reports they could understand, but the reports he prepared did not disclose the commissions charged on the accounts.

In 1988, the trustees, the trusts, and C.O. Brown, Inc. (hereinafter referred to collectively as "the trustees") filed suit against the appellees to recover losses caused by excessive buying and selling of CDs. The complaint alleged three theories of liability: breach of fiduciary duty under ERISA, violations of the Securities Exchange Act, and violations of the Minnesota Securities Act. The district court granted the appellees summary judgment on the ERISA claim after determining that Bayliss was not a fiduciary. The court also granted summary judgment on the two securities law claims because "C.D.s issued by federally insured banks are not securities under the federal or Minnesota securities laws." *Olson v. E.F. Hutton & Co.,* No. Civ. 4-88-634, slip op. at 4 (D.Minn.1990).

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After the district court entered summary judgment, the trustees sought leave to amend their complaint to include various state law claims. The district court denied the trustees leave to amend because the ***625** motion was untimely and because the court believed the new claims were preempted by ERISA. After the district court entered final judgment, the trustees appealed.

II. DISCUSSION

A. Fiduciaries under ERISA

A person is a fiduciary with respect to an ERISA plan

to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (1988). The trustees concede subsection three is inapplicable to this case because Bayliss was not granted discretionary authority. However, they claim that Bayliss qualifies as a fiduciary under both subsection one and subsection two. Mindful that "[t]he term fiduciary is to be broadly construed,"*Consolidated Beef Indus. v. New York Life Insurance Co.*, 949 F.2d 960, 963 (8th Cir. 1991), we examine the law pertaining to these two subsections before discussing the propriety of the district court's entry of summary judgment.

1. Subsection One

[1] There is a clear difference between the language contained in subsections one and three. Subsection one imposes fiduciary status on those who exercise discretionary authority, regardless of whether such authority was ever granted. Subsection three describes those individuals who have actually been granted discretionary authority, regardless of whether such authority is ever exercised. This interpretation, though sufficiently supported by the statute's language, is further supported by Congress' intent. *See*H.R.Rep. No. 93-533, 93rd Cong., 2d Sess. 11, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 ("a fiduciary is a person who exercises any power of control ...*or* who has authority or responsibility to do so.") (emphasis added); H.R.Rep. No. 1280, 93rd Cong. 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5038, 5103. Finally, we note this interpretation is consistent with Congress' desire that ERISA protect "the interests of participants in employee benefit plans and their beneficiaries,"29 U.S.C. § 1001(b) (1988), because it imposes fiduciary status upon those who act like fiduciaries as well as those who actually are fiduciaries. *Cf. Blatt v. Marshall & Lassman*, 812 F.2d 810, 812-13 (2d Cir.1987) ("[W]hether or not an individual or entity in an ERISA fiduciary must be determined by focusing on the function performed, rather than the title held."); *Lieb v. Merril Lynch, Pierce, Fenner & Smith*, 461 F.Supp. 951, 954 (E.D.Mich.1978) (When "the broker has usurped actual control over a technically non-discretionary account, ... the broker owes his customer the same fiduciary duties as he would have had the account been discretionary from the moment of its creation."). Thus, the absence of any grant of authority to Bayliss does not automatically preclude a finding that he is a fiduciary; Bayliss can be found to be a fiduciary if, as described by subsection one of the definition, he exercised discretionary control over the pension plans.[FN3]

> FN3. This does not mean that all actions with respect to a plan indicate discretionary power has been usurped. It is well established that one who performs only ministerial tasks is not cloaked with fiduciary status. *Anoka Orthopaedic Assoc. v. Lechner*, 910 F.2d 514, 517 (8th Cir.1990). We point out, however, that decisions relating to the use or disposition of plan assets are not merely ministerial decisions.

2. Subsection Two

Department of Labor regulations define the term "investment advice" as used in subsection two of the definition thusly:

A person shall be deemed to be rendering "investment advice" to an employee benefit plan, ... only if:

***626** (i) Such person renders advice to the plan as to the value of securities or other property, or

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makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and

(ii) Such person either directly or indirectly ...-

(A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or

(B) Renders any advice ... on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan....

29 C.F.R. 2510.3-21(c).

At issue in this case is the meaning of parts (ii)(A) and (ii)(B). Part (ii)(A) describes a person who has discretion with respect to an ERISA plan, even if such discretion did not arise from an "agreement, arrangement or understanding." Thus, part (ii)(A) essentially describes all people described by part one of § 1002(21)(A) (people exercising discretionary authority) and part three of § 1002(21)(A) (people who have been granted discretionary authority).[FN4]

> FN4. We concede this interpretation appears redundant, given that all people qualifying under part (ii)(A) of the regulation will be fiduciaries under subsections one or three of the statute even if they did not render investment advice. However, any other interpretation will fail to give meaning to the regulation's directive that discretionary control need not arise from an explicit grant of power.

[2] Part (ii)(B) is to be applied by first determining "whether under the regulation there existed a mutual agreement or understanding between the parties that [the broker's] advice would be the primary basis for the Plan's investment decisions." *Farm King Supply, Inc. v. Edward D. Jones & Co.*, 884 F.2d 288, 293 (7th Cir.1989). We agree with the Seventh Circuit that this issue "is comparable to the corresponding 'meeting of the minds' component of contract cases. Whether a meeting of minds exists is an issue for the trier of fact." *Id.* at 293 n. 6.[FN5]

> FN5. Of course, as the regulation states, such a "meeting of the minds" need not be in writing, and we believe the requisite understanding may be proven by examining the parties' course of conduct.

[3] These regulations were adopted to insure brokers are not given fiduciary status without their knowledge. *See id.* at 292-93 (citing 40 Fed.Reg. at 50843);*Pension Fund-Local 701 v. Omni Funding Group*, 731 F.Supp. 161, 165 (D.N.J.1990). Our interpretation of these regulations is consistent with this goal. A person who usurps authority over a plan's assets and makes decisions about the use or disposition of those assets should know they are acting as a fiduciary. Similarly, a broker necessarily has reason to know that his advice is being used as a primary basis for investment decisions with respect to plan assets if the facts demonstrate a meeting of the minds as contemplated by part (ii)(B) exists, thus it is proper to impose fiduciary status upon such a broker.

3. The Propriety of Summary Judgment

In reviewing the district court's entry of summary judgment, we apply the same standard as applied by the district court. *Kegel v. Runnels*, 793 F.2d 924, 926 (8th Cir.1986). In so doing, we "must view the facts in the light most favorable to the opposing party and must give that party the benefit of all reasonable inferences to be drawn from the facts." *Id.* Our independent review of the record convinces us that summary judgment was inappropriate in this case.

***627** As to the trustees' claim that Bayliss exercised discretionary control within the meaning of § 1002(21)(A)(i), the record is more than sufficient to withstand the appellees' motion for summary judgment. Among the trustees, Fogarty was Bayliss' principal contact. Fogarty could not recall Bayliss ever seeking permission to trade CDs and did not know that the CDs were being sold prior to maturity. Fogarty's testimony about the CDs was further supported by the trustees' intent that the CDs, as bond substitutes, represent stable and secure investments, by Bayliss' discussion of CD yields in terms of yield at maturity, and by the trustees' reliance on Bayliss to

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describe the accounts' status due to their inability to understand the monthly reports.

[4] Bayliss' deposition reveals that he tried to get permission prior to, or shortly after, purchasing or selling the plans' investments.[FN6] Fogarty confirmed this claim insofar as the sale of stocks was concerned, and conceded that this pattern of practice may have given Bayliss "inferred control" over the stocks. However, this concession does not contradict Fogarty's testimony regarding the CDs, and Bayliss' deposition answers do not specifically address the CDs. In sum, the record in the light most favorable to the trustees supports the view that though Bayliss obtained permission to trade stocks, he did not obtain permission to trade CDs.[FN7]

> FN6. We do not understand the legal significance of Bayliss' acquisition of post-trade permission in light of the fact that he was to obtain the trustees' permission prior to trading and was not supposed to exercise *any* discretionary control or authority.

> FN7. The district court determined "the evidence largely supports the position taken by [the] defendants." *Olson,* slip op. at 7 n. 2. This finding is suspect given the court's legal conclusion that the lack of an explicit or implicit grant of discretionary control to Bayliss prevented him from being a fiduciary. *Id.* at 7. Furthermore, our independent review of the evidence does not reveal such overwhelming support for the defendants' position.

As to the trustees' assertion that Bayliss rendered investment advice within the meaning of § 1002(21)(A)(i) and the corresponding regulation, the district court correctly determined that Bayliss "rendered advice as described in subsection (c)(1)(i) of the regulation." *Olson,* slip op. 9. Based on our discussion in the above paragraph, we conclude the record supports the trustees' assertion that Bayliss had discretionary control within the meaning of subsection (c)(1)(ii)(A) of the regulation. We also conclude a favorable reading of the record supports the trustees' position that the parties had an understanding that Bayliss' advice was to be a primary basis for investment decisions. The trustees initially contacted Bayliss because they wanted advice from someone more familiar with "the market." The trustees told Bayliss they wanted 80% of the plans' assets invested in bonds or bond-type instruments, but did not specifically mention CDs; it was Bayliss who first suggested that CDs would satisfy the trustees interests in a safe, steady investment. Once the accounts were open, Bayliss initiated calls to the trustees and informed them there were certain stocks he thought they should purchase or sell on behalf of the plans.

[5] The district court rejected the trustees' arguments because there was no proof of an actual agreement. The court also rejected the trustees claimed reliance on Bayliss' expertise in the market because "[t]he trustees were sophisticated individuals with extensive business responsibilities." *Olson,* slip op. at 9. However, this "weighing of the evidence" is inappropriate when ruling on a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). We believe the record demonstrates that Bayliss and the trustees had an understanding that Bayliss' investment advice would serve as the primary basis for investment decisions as described by subsection (c)(ii)(B) to a degree sufficient to prevent entry of summary judgment against the trustees.[FN8]

> FN8. In their brief and at oral argument, the appellees expressed concern over the fact that there were materials in the record on appeal that were not before the district court at the time summary judgement was entered. We make clear that our decision to reverse the district court is based solely upon our reading of the materials available to the court at the time summary judgment was entered.

***628** B. Application of the Securities Laws

The appellees rely on *Marine Bank v. Weaver,* 455 U.S. 551, 102 S.Ct. 1220, 71 L.Ed.2d 409 (1982) in contending that CD's are not securities within the meaning of the securities laws.[FN9] In *Marine Bank,* the Court conceded that "the certificate of deposit is not expressly excluded from the definition [of a security] since it is not currency and it has a maturity exceeding nine months." *Id.* at 557, 102 S.Ct. at 1224 (footnote omitted). However, the Court found that

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special circumstances warranted excluding the CD's at issue from the securities laws' protections. Specifically, extensive regulation of the banking industry virtually guaranteed repayment of any lost investment; hence, the investors were already protected and there was no need to offer additional protection by allowing a cause of action under the securities laws. *Id.* at 558-59, 102 S.Ct. at 1224-25.

> FN9. The definition of a security is essentially the same under both the Securitys Act of 1933 and the Security Exchange Act of 1934. *Marine Bank,* 455 U.S. at 555 n. 3, 102 S.Ct. at 1223 n. 3.

[6] Though *Marine Bank* is certainly germane to this case, it does not, as the appellees contend, conclusively hold that all CDs are beyond the purview of the securities laws. The Court expressly limited its holding when it said:

> It does not follow that a certificate of deposit ... invariably falls outside the definition of a "security" as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.

Id. at 560 n. 11, 102 S.Ct. at 1225 n. 11. This opportunity for a given CD to qualify as a security has been recognized and endorsed by Congress. *See*H.R.Rep. No. 97-626, Part I, 97th Cong., 2d Sess. 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2780, 2788.

[7] In determining whether *Marine Bank* removes a given investment from the protection of the securities laws, courts have focused on whether existing regulations guarantee a return of the investment. *E.g., Christison v. Groen,* 740 F.2d 593, 596 & n. 2 (7th Cir.1984). Where such guarantees exist, the securities laws provide no added protection. *E.g., Wolf v. Banco Nacional de Mexico, S.A.,* 739 F.2d 1458, 1462 (9th Cir.1984) (holding that Mexican banks were sufficiently regulated to prevent any risk of the investment's devaluation), *cert. denied,*469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 778 (1985). However, when the investment is not guaranteed, *Marine Bank* does not bar application of the securities laws to what would otherwise qualify as a security. *E.g., Reves v. Ernst & Young,* 494 U.S. 56, 110 S.Ct. 945, 953, 108 L.Ed.2d 47 (1990) ("we find no risk-reducing factor to suggest that these instruments are not in fact securities."); *Gary Plastic Packaging Corp. v. Merril Lynch, Pierce, Fenner & Smith, Inc.,* 756 F.2d 230, 239-40 (2d Cir.1985).

[8][9] The trustees claim that Bayliss "churned" the CD accounts. "Churning occurs when a securities broker buys and sells securities for a customer's account, without regard to the customer's investment interests, for the purpose of generating commissions." *Thompson v. Smith Barney, Harris Upham & Co.,* 709 F.2d 1413, 1416 (11th Cir.1983). The trustees further claim they were not adequately informed of the amount of commissions incurred due to this excessive trading. The appellees counter by alleging that the sale of CDs prior to maturity can be a valid investment strategy. Thus, though the parties disagree as to whether the CDs were sold with a good or evil intent, the parties do agree the CDs were sold prior to maturity. Regardless of whether the trading in CDs was approved by the trustees, and regardless of whether the trading of CDs prior to maturity constituted sound investment strategy or impermissible churning, we believe the securities laws extend their protection to the facts of this case. By selling and purchasing CDs in order to obtain gains due to the changing ***629** interest rates, the trustees relied (willingly or not) upon Bayliss' expertise. The banking laws do not protect against lost value in such circumstances, thus the trustees are left unprotected. Consequently, in those unusual circumstances in which CDs are sold prior to maturity in order to generate revenue from changes in the interest rate instead of being held to maturity (as is the customary investment practice with regard to CDs), the securities laws may be invoked in order to protect investors from the harms of impermissible churning. *Cf. Gary Plastic,* 756 F.2d at 241 ("absent the securities laws, plaintiff has no federal protection against fraud and misrepresentation by the defendants in the marketplace."). Similarly, because the banking laws may not address the need for disclosure of a broker's commission or offer redress for the trustees' claim that the CDs were traded without permission; other gaps in protection may exist. Therefore, the court should examine the extent of the banking laws' protections and, where such gaps in protection exist, allow the trustees to allege a securities law claim.

The district court also granted judgment in favor

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of the appellees on the trustees' state securities law claims. In so doing, the court relied on *Caucus Distributors v. Commissioner of Commerce,* 422 N.W.2d 264, 272 (Minn.Ct.App.1988), *cert. denied,*488 U.S. 1006, 109 S.Ct. 786, 102 L.Ed.2d 778 (1989), which in turn cited *Marine Bank.* For the same reasons we vacate and remand with regard to the trustees' claims under the federal securities laws, we also vacate and remand with regard to the state securities laws claims.

C. Other Issues

Because this case is to be remanded, the district court will undoubtedly enter a new scheduling order. Therefore, we decline to discuss the preemption issue and we do not need to consider whether the district court abused its discretion in denying the trustees' motion to amend the complaint. Finally, we note that E.F. Hutton and Shearson Lehman Hutton were granted summary judgment because their employee, Bayliss, was granted summary judgment. Consequently, we also vacate the judgment in favor of E.F. Hutton and Shearson Lehman Hutton.

III. CONCLUSION

[10] Though the standard of review in this case requires us to view the facts in the light most favorable to the trustees, our discussion today should not be viewed as a decision on the merits of the trustees' claims. However, given this favorable standard of review, the record is sufficient to create a reasonable factual dispute as to whether Bayliss was a fiduciary under ERISA. Similarly, Bayliss' actions may have caused damage not insured by the banking laws; therefore, the securities laws may need to be invoked in order to bridge a gap in federal protection. Finally, the separate issue of liability of Bayliss' employers was not independently addressed below. For these reasons, we vacate the judgment of the district court and remand for further proceedings.

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